E. I. DuPont de Nemours and Company, Inc. *and* **United Steelworkers of America, AFL-CIO, CLC.** Cases 11-CA-8986 and 11-CA-9095

July 23, 1981

DECISION AND ORDER

On February 18, 1981, Administrative Law Judge Hutton S. Brandon issued the attached Decision in this proceeding. Thereafter, Respondent and the General Counsel filed exceptions and supporting briefs, and Respondent filed a brief in response to the General Counsel's exceptions.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions[2] of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, E. I. DuPont de Nemours and Company, Inc., Wilmington, North Carolina, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

[1] The Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] While the record shows that Supervisor Monroe remarked to Thomas that Respondent considered Thomas' union activities and filing of a workmen's compensation claim to be threats to Respondent, in the absence of exceptions we adopt *pro forma* the Administrative Law Judge's conclusion that Respondent's remarks only with respect to Thomas' union activities constitute a violation of Sec. 8(a)(1) of the Act.

DECISION

STATEMENT OF THE CASE

HUTTON S. BRANDON, Administrative Law Judge: This case was heard at Wilmington, North Carolina, on October 8 and 9, 1980.[1] The charge in Case 11-CA-8986 was filed by the United Steelworkers of America, AFL-CIO, CLC, herein called the Union, on March 12, while the charge in Case 11-CA-9095 was filed by the Union on April 28 and amended on May 30. An order consolidating cases, consolidated complaint and notice of hearing issued on July 2, alleging that E. I. DuPont de Nemours and Company, Inc., herein called the Respondent or the Company, violated Section 8(a)(1) of the National Labor Relations Act, as amended, herein called the Act, through the conduct and statements of a number of supervisors, and violated Section 8(a)(3) and (1) of the Act in issuing a warning notice to its employee, Harry Thomas, on October 29, 1979, and thereafter placing Thomas on probation on the following April 19.

Upon the entire record,[2] including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by the General Counsel and the Respondent, I make the following:

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a Delaware corporation with a plant and facility located at Wilmington, North Carolina, where it is engaged in the manufacture of textile fibers. During the 12 months preceding issuance of the complaint the Respondent received goods and materials valued in excess of $50,000 directly from suppliers located outside the State of North Carolina. During the same period of time the Respondent shipped goods and materials valued in excess of $50,000 directly from its Wilmington facility to points outside the State of North Carolina. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act. The complaint alleges, the Respondent's answer admits, and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. MATERIAL FACTS

A. *Background*

The Union began an organizational campaign at the Respondent's Wilmington plant in early 1978. Another labor organization, Boilermakers International Union, conducted a simultaneous campaign which culminated in that organization's filing a petition with the National Labor Relations Board. The Union intervened but subsequently withdrew prior to the election which was held in 1978, which the Boilermakers lost. The Union renewed its organizational activities in early 1979. By April of the following year, according to the testimony of International Organizer John W. Kitchen, the Union had secured the signatures of a majority of Respondent's employees on union authorization cards. The 8(a)(1) conduct which was alleged in the complaint and attributed to the Respondent's supervisors occurred during the period from late October 1979 until mid-March of the following year. Additional 8(a)(1) violations attributed to the Respondent occurred following the filing of the charges herein; they were related to the Respondent's advising employees named in those charges that disciplinary notations in their respective personnel files would not be removed notwithstanding the Respondent's normal procedures of periodically removing such notations.

[1] All dates are in 1980 unless otherwise stated.

[2] Errors in the transcript have been noted and corrected.

B. *The 8(a)(1) Allegations*

The General Counsel presented a number of witnesses to establish the alleged 8(a)(1) violations. The first was employee Charles Casteen who, at the time of the hearing, had worked for the Respondent for about 7 years. Casteen related that in the last of February or the first of March he was approached on his job assignment by Don Summerlin, relief supervisor for the yarn inspection department. According to Casteen, Summerlin started the conversation with Casteen about unions and union organizing and asked if Casteen were an organizer. Casteen, by way of an answer, referred to his union pin which he was wearing at the time identifying him as a union supporter. Summerlin also asked if Casteen had not been passing out some union material, and Casteen replied affirmatively. Summerlin responded that Casteen should not take it as a threat but, because Casteen had been written up on an unsatisfactory performance contact (UPC), a step in the Respondent's progressive disciplinary procedure for employees, it might be best if Casteen "lay low on union matters." Casteen added during cross-examination that Summerlin had also asked him why he was for the "union stuff." Casteen had replied asserting his reasons listing those things that the Union could offer employees which the Respondent itself could not.

While Summerlin, called by the Respondent, did not deny that he had had a conversation with Casteen in which the unsatisfactory performance contract was mentioned, Summerlin placed the conversation at or around March 9. He testified that it was an outgrowth of a prior conversation with a group of employees concerned about payroll employees not being paid for certain "snow days" when certain other employees had been paid. Summerlin had explained the reasons, and the group of employees had dispersed leaving Summerlin talking with Casteen. He told Casteen that he knew Casteen was on UPC and suggested that it would help Casteen's status if he would stay on his job assignment. Thereafter, Casteen complained about one of his prior supervisors and indicated that that was the reason employees needed a union. Summerlin inquired whether the Union was needed because of one supervisor. Casteen replied affirmatively and Summerlin told Casteen he would like to discuss it further with him to give the Company's side of the matter. Casteen responded that he did not think Summerlin would have much luck.

The General Counsel contends, based on Casteen's testimony, that Summerlin unlawfully interrogated Casteen in violation of Section 8(a)(1) and likewise violated that section of the Act by Summerlin's threat to "lay low on union matters" during the time he was on UPC. Having considered the matter, I find Casteen's testimony straightforward and candid. Casteen's testimony was all the more credible because he was an employee of the Respondent at the time of the hearing and was testifying adversely to his pecuniary interest. *Gold Standard Enterprises, Inc., et al.*, 234 NLRB 618, 619 (1978); *Georgia Rug Mill*, 131 NLRB 1304 (1961), modified 308 F.2d 89, 91 (5th Cir. 1962). The fact that Casteen was on probation at the time of testifying, a point relied on by the Respondent in establishing prejudice, tends to enhance Casteen's credibility inasmuch as it increased the risk inherent in his testifying adversely to the Respondent. Based on Casteen's testimony, I find that the Respondent did violate Section 8(a)(1) of the Act by Summerlin's interrogation of him. The fact that Casteen was wearing a union pin at the time of the interrogation does not detract from the violative nature of Summerlin's question. *PPG Industries, Inc., Lexington Plant, Fiber Glass Division*, 251 NLRB 1146 (1980). I also find and conclude that Summerlin's threat to Casteen to "lay low" on union matters constituted a threat of unspecified reprisals violative of Section 8(a)(1) of the Act, as alleged in the complaint.

The Respondent's coercive conduct was not limited to Summerlin. Employee James Wimbish related in his testimony that around October 20, 1979, he engaged in a conversation with Billy Allen, a first-line supervisor in yarn, concerning dental plans. After telling Wimbish about the substantial amount of work he had had performed on his teeth paid for under the Respondent's dental plan, Allen commented that with all the benefits the employees had at the Company he did not see why employees needed a union. According to Wimbish, Allen then asked him how he felt about the Union. Wimbish replied that he had worked for United Parcel Service previously where there was a union, but that he really did not think that much about the Union. Wimbish added that he did not think a union would accomplish that much with a big company like DuPont.

Allen denied that he had discussed union activity with Wimbish. Further, while he admitted that Wimbish had at one point asked him for some dental insurance claim forms, there had been no discussion of the forms or dental benefits.

Wimbish's version of the conversation appears logical and reasonable. He exhibited generally good recall and he testified in a forthright and convincing manner. Since it is clear—even by Allen's admissions—that Wimbish had some sort of dental problem and claim, it is not unlikely that the two would have discussed the matter. I credit Wimbish's testimony that there was such a discussion and that it led to Allen's question of Wimbish regarding his union support. I therefore conclude that Allen's question constituted unlawful interrogation in violation of Section 8(a)(1).

Wimbish went on to testify that also on or about March 18 he talked to Larry Hewett, a first-line supervisor in yarn spinning, while the two were out on the production floor. Wimbish expressed his appreciation to Hewett for allowing him to work with Hewett that week on loan from his regular crew. Hewett responded by observing that he thought that Wimbish's problem was his regular supervisor, an apparent reference to the fact that Wimbish had received a prior unsatisfactory performance contact. Hewett further told Wimbish that he knew Wimbish had gone to the union meeting the Monday night before and that the supervisors "upstairs" including Bill Sue and Bill Cruise also knew it. Hewett added that he knew that all but four operators in that work area had signed union authorization cards. Hewett further told Wimbish that there had been about 28 people at the union meeting.

Hewett admitted having a conversation with Wimbish about Wimbish's regular supervisor, Billy Allen, a conversation initiated by Hewett's inquiry of Wimbish if he had any problems. When Wimbish replied that his problem was Allen, Hewett asked if that was why he was supporting the Union.[3] Hewett further admitted that there was discussion about the union meeting but that he had told Wimbish that he did not know whether Wimbish had attended and he did not care. When Hewett commented that he had heard there were 25 or 30 people there, Wimbish had replied that there were 28. There followed a discussion of Wimbish's report of what had taken place at the meeting.

Wimbish's testimony with respect to his conversation with Hewett was reasonable, particularly in light of the partial admission of Hewett that he inquired if Allen were the basis of Wimbish's union support. I find Wimbish credible. Accordingly, I find that the Respondent, through Hewett, unlawfully interrogated Wimbish and created the impression of surveillance of the union meeting by announcing the number that had attended. In this regard, I find that the Respondent violated Section 8(a)(1) of the Act as alleged in the complaint.

Wimbish further testified that while in the office of Bill Cruise, a second-line supervisor in the yarn spinning department, on or about March 18, the date following a union meeting, Cruise asked Wimbish what he had done the night before. Although Wimbish had gone to the union meeting, he advised Cruise that he had gone home and gone to bed. Cruise, called by the Respondent, testified that about the time testified to by Wimbish he had arranged a meeting between Wimbish and Section Supervisor Bill Sue in yarn spinning, and had observed Wimbish in Allen's office waiting to see Sue. Cruise denied asking anything about Wimbish's whereabouts the night before, but claimed that he inquired about Wimbish's apparent sunburn and Wimbish explained he had incurred it while water skiing.

Finally, Wimbish testified that on March 21 he was called to Cruise's office where they discussed Wimbish's being swapped from Billy Allen's crew to Larry Hewett's crew. During the course of the conversation, Wimbish raised the subject of the Union, and advised Cruise that he had been to the union meeting. Cruise's response was that he knew Wimbish had. Wimbish then went on to state that he told Cruise that he had talked to a teacher at a local technical school regarding the Union and that that teacher had said he did not think the Union could do much for Du Pont employees because Du Pont was such a big company, and all they had to do was to close down and move elsewhere. Wimbish concluded by saying that he really was not that "hepped up" on the Union and Cruise ended the conversation by telling Wimbish to keep him informed on what was going on.

Cruise recalled the conversation with Wimbish but placed it around March 17 or 18, when Wimbish had sought an interview with Cruise. He denied the specific remarks attributed to him by Wimbish. Instead, Cruise stated that Wimbish had used the occasion to ask Cruise his opinion about the Union. Cruise could recall no reference by Wimbish to any statements of a former teacher. Cruise acknowledged that during the conversation he had told Wimbish to "communicate with his supervisor." According to Cruise, this direction was simply an effort to have the employees inform the supervisors of any problems they were experiencing in order to improve the relationship.

Wimbish's recall was not perfect, and he exhibited some confusion as to the exact sequence of events in the several days following the union meeting and the time when he discussed the matter with his supervisor. Nevertheless, Wimbish impressed me as basically sincere in his testimony, and I find him credible where his testimony contradicts that of Cruise. Based on Wimbish's testimony, I conclude that Cruise's acknowledgment to Wimbish of Wimbish's attendance at a union meeting was confirmation of the impression previously received by Wimbish from Hewett that the Respondent had the union activities of its employees under surveillance. To this extent, Cruise's remark to Wimbish constituted a further violation of the Act. Cruise's request to Wimbish to keep him informed about what was going on, in the context of discussions regarding the Union, was clearly susceptible to the interpretation that I find most probable, that Cruise was seeking to have Wimbish report on the union activities of other employees. Such a request, I find and conclude, violates the Act. A request to report union activity tends to cause employees to fear that such information is sought by the company in order that it might discourage those activities by discharging or engaging in other reprisals against the employees supporting the union. *Performance, Inc.*, 208 NLRB 618, 624 (1974). Crediting Wimbish's testimony that Cruise also asked him around March 18 what he had done the night before, I conclude that the question was a reference to Wimbish's attendance at the union meeting. I further conclude that it therefore constituted unlawful interrogation.

Another incident of unlawful interrogation was attributed to Supervisor Cruise by a former employee, Donald Eubanks. Eubanks testified that he was a union supporter and wore a union button showing union support in the plant in early 1980. On February 10, 1980, according to Eubanks, he went into Cruise's office to obtain a wrench needed to make some machine adjustments. Cruise noted the button appearing on Eubanks' pocket and asked him what it was. Eubanks replied that it was a union button and further explained that it was a Steelworkers button. Cruise then asked him when had he become a Steelworkers member and why had he become a Steelworker. Cruise in his testimony did not deny the conversations and admitted that he had asked Eubanks about the button and that a conversation concerning unions ensued. Cruise did not specifically deny that he had asked Eubanks why he wanted the Union, and it may be reasonably inferred that such an inquiry was made since Cruise admitted that Eubanks gave him the reason why he in fact was supporting the Union. Accordingly, I credit Eubanks. I find, as alleged in the complaint, that Cruise's

[3] Hewett testified that he was aware of Wimbish's union support because of Wimbish's wearing union buttons and also because of "scuttlebutt conversation." Wimbish, in his testimony, denied that he ever wore union buttons.

inquiry of Eubanks violated Section 8(a)(1). *PPG Industries, Inc., supra.*

An unlawful threat of an unspecified reprisal for union activity was attributed to First-Line Supervisor Darrell Monroe of the petrochemical department by Harry Lee Thomas, the alleged discriminatee in this case, about whom more will be related later. Thomas, who had received an unsatisfactory performance contact from the Respondent on October 29, 1979, testified that, a week following his receipt of the UPC, a friend and fellow employee, Phillip Baham, suggested to Thomas that he talk to Monroe who was a personal friend of Thomas. Thomas did telephone Monroe at his home and Monroe described to Thomas a meeting he had attended involving 13 supervisors. Thomas testified that Monroe told him that Thomas had been discussed at the meeting, and the spokesman at the meeting, not identified on the record herein, had stated that Thomas could have been fired for what he had done, apparently a reference to those matters involved in the UPC. Monroe and another supervisor named Jerry Little asked why and they were told to ask Second-Line Supervisor Claude Platt. Monroe went on to relate to Thomas that the "spokesman" at the meeting had said that Thomas was a "threat" because he tried to sue the Respondent for his hernia operation in the summer of 1979, and that he was also a threat because of his union activities. When Monroe had stated at the meeting in response to the reference to union activities that he thought that it was an employee's privilege to be involved with the Union, the response from the spokesman was simply that he could see that Monroe was "operator oriented."

Monroe, called by the Respondent, denied ever having a telephone conversation with Thomas, and further denied attending a meeting where Thomas and either his union activities or his hernia (which was the basis for his subsequent workmen's compensation claim against the Respondent) was discussed. Monroe testified that Thomas on only one occasion had asked him "in an indirect manner" if supervision had held meeting about Thomas. Monroe claimed that his response was that supervision did not hold group meetings about any person.[4]

I find the testimony of Thomas credible, although vague and at times conclusionary. Monroe appeared ill at ease while testifying, and he was not corroborated by the other supervisor, Jerry Little, who was alleged to have been at the meeting when the comments were made. Accordingly, and also because the likelihood of the passing of information beneficial to Thomas by Monroe was increased by the longtime friendship which existed between the two, I credit Thomas' version over Monroe's. I find that Monroe made the remarks attributed to him by Thomas and I find and conclude that such remarks conveyed to Thomas the message that his union activities were considered to be a threat to the Respondent and, accordingly, made him an object of retaliatory action. These remarks of Monroe, I conclude, violated Section 8(a)(1) of the Act as a threat of unspecified reprisal, as alleged in the complaint.

A final 8(a)(1) violation was attributed to the Respondent on the basis of stipulated facts related to the insertion of certain notices in the personnel files of four employees. Based on the stipulated facts, employees Harry Thomas, Dorothy Hill, Eddie Riggins, and Jimmie Sellers who were alleged as discriminatees in then-pending unfair labor practice charges were called into the offices of their respective supervisors on various dates in May and were told that a specific notice which was shown to them was being put into their personnel files. The notices[5] which were addressed to the respective employee's file contained the following language, with the blank space filled in with the appropriate case number:

> The documents in this folder are being used in the investigation of an Unfair Labor Practice Charge————————. No records are to be purged from this file without prior approval of the Personnel Supervisor until further notified.

It was the testimony of the Respondent's former personnel supervisor, Delbert Horton, that the Respondent followed a procedure whereby records concerning disciplinary contacts were kept in employees' personnel files for a period up to 3 years but could be removed earlier when the disciplinary action had achieved its purpose. When the records of the contacts had served their purpose they were destroyed by the supervisor involved in the presence of the affected employee. According to Horton, it was determined that those records pertaining to employees involved in the unfair labor practice charges should be preserved until the charges were disposed of. Therefore, by letter dated May 9 to Supervisors Woody Wayne, Larry Hewett, Bobby Black, and Howard Stroupe, Horton advised the supervisors that letters containing the language set forth above should be placed in the employees' folders with their knowledge to prevent accidental purging of original documents that might be needed in litigation proceedings if such should occur.

The General Counsel does not argue that it is an unfair labor practice to preserve records for the purpose of defending unfair labor practice charges. She does argue, however, that by advising employees that the records which might otherwise be purged were being preserved, the Respondent's conduct was coercive and interfered with the employees' freedom to engage in union activities and to have their rights vindicated through the filing of unfair labor practice charges. In this regard, the General Counsel relies primarily on the fact that there was no evidence that the affected employees were given any assurances that records related to their disciplinary status would not be continued past the time of their normal duration. Thus, according to the General Counsel, the employees being told that the records were in effect "frozen" would reasonably conclude that the filing of the charge in which they were involved would serve to prolong the retention of disciplinary records beyond

[4] The Respondent concedes, however, that supervisory meetings are held monthly to discuss safety, production, and personnel problems. However, the group of supervisors is generally limited to six or seven.

[5] G.C. Exhs. 15, 16, 17, and 18.

the time of their normal effectiveness. The Respondent, on the other hand, argues that the decision to preserve the records in no way affected any of the employees' disciplinary status. Moreover, the Respondent argues that, since no employees testified regarding the notices, it must be assumed that they did not feel threatened and there was nothing within the notice *per se* which was read to the employees which would tend to constitute a threat.

Neither the General Counsel nor the Respondent cites any Board authority for their respective arguments. However, the General Counsel reminds by citing *Seneca Foods Corporation*, 244 NLRB 558 (1979), that it is the reasonable expectation of coercive effect on employees rather than the actual effect which is determinative in establishing a violation of Section 8(a)(1) of the Act.

If it is lawful for the Respondent to retain the records of employees involved in charges as conceded by the General Counsel, it is difficult to perceive how it was unlawful for the Respondent to advise the employees that it was doing so. There is no evidence of any intent to coerce the employees through the notices. And employees who are named as discriminatees in unfair labor practice charges may reasonably anticipate that employers may defend against those charges and, in so doing, may rely on employee records normally maintained by the employer and even retaining such records beyond their normal destruction or removal dates. Furthermore, employees may well welcome assurances that their records which could support their claims of discrimination would be preserved. Thus, the retention of records during either the investigation or litigation stage of an unfair labor practice charge is in the interest of both the employer and the employee. In the instant case, there is no evidence that any of the employees were adversely affected by the retention of the records. Nor is there evidence that the filing of the charge in fact resulted in the retention of any records beyond the date they normally would have been purged from the employees' files in keeping with the Respondent's personnel policies. Finally, and contrary to the contention of the General Counsel that the notices to the employees' files earmarked them as union activists and participants in unfair labor practice charges, the notices related solely to specific unfair labor practice cases and, while the duration of the effectiveness of the notices was indefinite, it was clearly related to the charges. Employees reading the notices and hearing of them could reasonably conclude that such notices were effective only during the pendency of the charges. Under all the circumstances I conclude, contrary to the General Counsel's argument, that in advising employees of the notices inserted in their files the Respondent did not violate Section 8(a)(1) of the Act.

C. *The 8(a)(3) Allegations*

Harry Lee Thomas had been employed by the Respondent in its DMT department, petrochemical division, for about 6 years prior to the hearing herein. Thomas testified that, prior to the disciplinary actions taken by the Respondent which are the subject of the unfair labor practice complaint herein, he had had no prior discipline from the Respondent. He began his involvement with the union activity with the Boilermakers union sometime in 1978 after his then supervisor, Fred West, in a discussion with him about the Union, stated that the Respondent thought that Thomas was a union organizer.[6] Apparently incensed by the false accusation Thomas immediately thereafter went out and obtained a button identifying himself as a Boilermakers supporter. Thomas testified that on March 21, 1979, in a state of the business meeting normally held between managers and employees at the plant, a plant manager whose name he could not recall made a comment about union organizers which Thomas apparently considered to be derogatory. Thomas raised an objection to it and identified himself as a union organizer, apparently referring to his organizational efforts with the Boilermakers, and commented that the plant manager should have seen Thomas wearing union material. The unidentified plant manager responded that he was just speaking his point of view and Thomas replied that he was speaking his. The manager stated "no hard feelings" and Thomas replied by repeating the phrase.

A few days later, on March 24, Thomas received an employee performance review (EPR) from his then immediate first-line supervisor, Fred West, which was approved by his shift supervisor, Claude Platt, rating Thomas as needing improvement in the areas of housekeeping, productivity, adaptability, working with supervision, and job interest initiative. Specifically, the review stated that Thomas "does not cooperate with supervisors. At times he is very reluctant."[7] Thomas objected to the conclusions in the EPR and related that he had a subsequent conversation with West about it at some unspecified later point in time. Thomas further testified, and West in his testimony denied, that Thomas complained to West that the EPR did not even "sound" like West, and West had replied that he did not agree with the EPR and that he would give Thomas another one 2 months later, but he could not do so at that point because the original EPR was "up the hall." While West in his testimony admitted that he had offered to reevaluate Thomas after 1 or 2 months if Thomas thought the EPR was unfair, he claims that he made that comment at the time that Thomas received the EPR, not sometime later, and Thomas rejected the offer.[8]

Apparently, as a result of the unfavorable EPR Thomas became involved in the renewed Steelworkers campaign on March 27, 1979. He became a member of the Dupont Organizing Committee (DOC) and wore union buttons and insignia on his jacket. He was conceded by fellow employees on his shift to be a most active union supporter. The Respondent concedes knowledge of Thomas' union advocacy.

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[6] This testimony, first related by Thomas during rebuttal, was not specifically contradicted by West and is credited.

[7] Thomas' last preceding employee performance review in 1978 had also rated him as needing improvement in housekeeping and productivity.

[8] While the General Counsel urges that the EPR was discriminatory, no violation of the Act can be based on the EPR because it was time-barred under Sec. 10(b) of the Act. However, evidence on the EPR was allowed for background purposes reflecting on the Respondent's attitudes toward responsibilities under the Act. *Pandair Freight, Inc.*, 253 NLRB 973 (1980).

On May 31, 1979, a few minutes after pulling on a chain to release a valve while at work, Thomas felt pain in his groin area and sought medical attention at the plant. Thomas' complaint was eventually diagnosed as a hernia and he underwent a hernia operation on June 13, 1979. Upon submitting claims for his medical expenses, Thomas discovered that the insurance carrier refused to pay the claim because Thomas had indicated that his injury was work related. Thomas took the matter back to the Respondent and the Respondent's medical doctor filled out the appropriate forms and advised the safety department that Thomas was not hurt on the job. The doctor explained, but not to Thomas' satisfaction, that there were several ways that one might encounter a hernia.[9] The insurance carrier ultimately paid Thomas' medical bills. However, having been offended by the Respondent's claim that the injury was not work related, Thomas filed a workmen's compensation suit against the Respondent. That matter proceeded to hearing despite the Respondent's claim that there was no need for it in view of the fact that Thomas' medical bills had been paid. There was an award in Thomas' favor, dated December 14, 1979. Shortly after the award, and still in December, Thomas submitted to the Respondent an additional unpaid medical bill growing out of his injury and was told by Shift Supervisor Claude Platt that Thomas had not been hurt at the plant and the Respondent was not going to pay any bills.[10] Platt persisted in this position even after Thomas showed him a "letter" from the State Industrial Commission regarding the workmen's compensation matter. Thomas concluded his discussion with Platt on the matter by stating that he would take it to his attorney and let her handle it. The next day, however, Platt called Thomas back into his office and reported to him that the Respondent would pay the bills.

During the pendency of his workmen's compensation claim, on October 29, 1979, Thomas received an unsatisfactory performance contact from his then supervisor, Lanny Nunn. The UPC, which the General Counsel argues was discriminatory and in violation of Section 8(a)(1) and (3) of the Act, was an initial step in the Respondent's progressive disciplinary procedures. The UPC was based on three separate events which had occurred within the preceding 30 days. Such events must be related in some detail.

The first offense referred to in the UPC occurred on September 30, 1979, and involved an alleged demonstration of Thomas' lack of respect for supervisory authority and failure to cooperate with two members of supervision at the truck shed. There is little dispute with respect to the basic facts of what occurred. One of Thomas' job functions was to load certain tank trucks with the Respondent's molten product. It is undisputed that the loading process requires the operators to wear protective clothing in view of the heat or corrosiveness of the product. There is no dispute that the practice had been that if a truck came in with a red tag on it signifying that it needed repairs it was not to be loaded. There is a dispute with respect to whether the procedure was automatically to send the truck back to the terminal in view of the red tag. In any event, on September 30, Thomas, upon observing a truck with a red tag on it, returned to the truck shed and announced that the truck should be sent back to the terminal. First-Line Supervisor Bobby Black happened to be in the truck shed at that particular point in time, although he did not have primary responsibility for the loading area, and upon hearing Thomas' claim went outside to observe the truck. Black came back into the truck shed and told Thomas to connect up the truck. Thomas tried to contact his immediate supervisor, Lanny Nunn, about the matter but there was no response to Nunn's page. Thereafter, according to Thomas' testimony, he contacted his second-line supervisor, Platt, who told him to send the truck back to the terminal. Thomas, in the presence of Black, told the truckdriver what Platt had said, and thereafter Black called Platt and, after completing the call, told Thomas to hold the driver. Thereafter, Platt came to the truck shed and he and Black instructed Thomas to hook up the truck. Thomas went outside in his protective clothing and hooked up the steam hose to the truck as the first step in the loading procedure, after having been assured by Platt that Platt would assume all responsibility. After hooking up the steam, Thomas returned to the truck shed and attempted to place a telephone call to the then DMT plant superintendent, Michael F. Sujka, while Platt and Black went outside to check the truck without any protective gear on. Thomas explained in his testimony that he was attempting to call Sujka because Platt and Black were violating safety procedures by going into the truck bay area without protective equipment on and with the steam hose attached. According to Thomas, no employee was to enter the bay area without safety equipment at any time that any hose, product or steam, was attached to the truck. Upon the return of Black and Platt to the truck shed they told Thomas to let the truck go back to the terminal.

The versions of Platt and Black are slightly different from that of Thomas. They related in their testimony that a red tag on a truck indicated that there was something wrong with it and that the product should not be loaded, but the truck was not automatically returned to the terminal. If there was a mechanical problem which could be remedied in the bay area without sending the truck back to the terminal, then such a repair could be effectuated and the truck loaded. In this instance Black said that upon his first observation of the truck he discovered a valve with a bent handle which prevented it from closing. Black bent the valve handle so that the valve could close and, thinking that he had remedied the problem, went back to the truck shed and instructed Thomas to hook up the steam line so it could be checked out. Thomas refused, claiming it was against manual instructions. Black said they got out the manual and read the provision regarding the loading of trucks, and it did not provide that the truck had to be sent back automati-

[9] The Respondent rated Thomas' injury as nonattributable; i.e., it happened while at work but was not work related. This was based on the fact that Thomas' pain did not occur until sometime after the assertion of physical energy which Thomas claimed caused it.

[10] Platt in his testimony herein related that on the day of his injury Thomas had told him that the injury was "something he had always had." Thomas denied it in his testimony. I credit Thomas.

cally. It was then that Thomas attempted to call his supervisor and finally talked to Platt. Thereafter, Black talked to Platt and asked Platt to come to the truck shed, which he did. The testimony of Black and Platt is in agreement that after Black showed Platt what the apparent problem was Thomas was instructed to hook up the steam line so the matter could be checked out. It is conceded by Platt and Black that they did not wear a "hot suit" when they went back out to check the truck while the steam line was hooked up, but both contend that they were not required to wear a hot suit under the then-prevailing safety procedures. When it was ascertained that the truck had other problems which could not be remedied there, Thomas was instructed to unhook the steam hose and send the truck back to the terminal. It was then that Thomas accused them of violating safety rules and attempted to obtain the number of Sujka to report the matter.[11] Platt testified that he refused to give Thomas the telephone number for Sujka because he was not going to allow Thomas to call anybody at 5 a.m., but added that Thomas could use the "open door policy" and report the matter to the safety superintendent at a later time. Nevertheless, when Platt went to Larry Nunn's office a short while later he found Thomas still trying to secure the telephone number of Sujka, so Platt instructed Nunn to get Thomas back on the job.

The UPC referred to the truck shed incident of September 30 as demonstrating a lack of respect on the part of Thomas to supervisory authority and a failure to cooperate with members of supervision at the truck shed.[12] The second incident referred to in the UPC involved a matter which occurred on October 18, 1979. On that date, according to the UPC, Thomas was contacted by a safety supervisor for Daniel Construction Company, a maintenance and building contractor at the site, in regard to the cleanup of an oil spill on the firing aisle floor. That supervisor, Larry Dillon, testified in this proceeding for the Respondent that he initially contacted Thomas, the first Du Pont employee he observed after finding the spill, and asked Thomas, whom he did not know at the time, who he should contact regarding the oil spill. Thomas, according to Dillon, indicated that he was aware of the spill and that he would be taking care of it. Approximately 30 minutes later, however, Thomas saw Dillon, approached him, and asked who Dillon was. Dillon explained that he was Daniel's safety supervisor. Thomas appeared irritated and angry and told Dillon that if Dillon ever had to talk to Thomas again to take the 20 cents that Thomas had in his hand and present it to Dillon and to call somebody who gave a "f--k." Shortly thereafter, Dillon reported the matter to the Respondent's supervision.

Thomas' version of the matter differs from that of Dillon only in minor respects. Thus, Thomas testified that he did not know who Dillon was at the time Dillon first advised him of the oil spill, and he did not respond to Dillon at that time. Subsequently, he learned that Dillon worked for Daniel, so he approached Dillon, advised Dillon that he worked for Du Pont and told Dillon that if Dillon saw anything in his area to contact Thomas' supervisor and if he could not find Thomas' supervisor to take 20 cents and call somebody. Thomas did not specifically deny the vulgarity attributed to him by Dillon.[13] Moreover, when he was chastised about the matter by Nunn subsequently on the same day, he agreed with Nunn that it should not happen again.

The third matter complained of in the UPC occurred a day or two before the UPC was issued when Thomas was admittedly asked to read and initial some material relating to revisions in the safety manuals and procedures. In this regard, Thomas acknowledged in his testimony that about October 28 he had been told by Nunn to read and sign some papers. When he went to the control room, Supervisor Bobby Black gave him the forms, "Standard Practice and Procedure Revisions," to read and Thomas took the papers over to a desk; Thomas sat down and read them. He had a question on one of the forms relative to a standard practices revision. He related that he asked some other employees about the matter he had a question on but was unable to get satisfactory answers. He thereafter sought out his supervisor, Nunn, but could not find him. He went home before finding a supervisor and consequently he did not sign the forms. Before he had asked his question on the next day of work, he was called into the office and given his UPC which cited his failure to sign the forms.

Platt was present in Nunn's office when the UPC was given to Thomas. The record shows no argument by Thomas with respect to the UPC although Thomas did write on the UPC that he disapproved of it. Thomas did not attempt to grieve his UPC until about January 1980 at which time he initiated the grievance procedure and went through three steps of that procedure involving Platt Senior Supervisor Godfrey L. Little, and Superintendent Sujka. All found merit to the UPC and were critical of Thomas on a number of additional factors. Only at the third step did Thomas claim that his UPC was based on his support for the Union; however, this claim, made to Sujka, was found to be without merit by the Respondent. Thomas failed to proceed further with

[11] The safety rules pertinent to this matter were revised on November 2, 1979, and the old rules destroyed to avoid confusion. The Respondent's witnesses disagreed on just how the rules were revised, but the revised rules were placed in evidence, G.C. Exh. 20. While the rules do not reflect how they were revised they do show which ones were revised. Accordingly, I am persuaded that Thomas' testimony that the rules required the wearing of "hot suits" in the bay area while any hose was connected to the truck was correct since the revised rules of November 2 which set forth this requirement do not reflect that this rule was in fact revised. On the other hand, I am also persuaded that the old rule regarding red-tagged trucks prohibited only their loading, not the connection of a steam hose only to the truck. The revised rules on this matter, marked as a revision, specifically provide for the procedure which Platt and Black followed on September 30 in not automatically sending the truck back to the terminal.

[12] Lanny Nunn gave Thomas a verbal contact on October 5 regarding the episode in the truck shed, admonishing Thomas to acknowledge the authority of supervision to make decisions for them even if it related to handling a job "or condition" in a way it had not been handled in the past, except in instances which would put employees in an unsafe working condition. Resp. Exh. 10.

[13] Dillon's testimony was logical and he impressed me as being clearly disinterested. I credit his version to the extent it conflicts with that of Thomas. In either version I would find that Thomas was disrespectful and impudent to Dillon. The General Counsel in her brief concedes that Thomas was at fault in the matter.

the grievance procedure admittedly because the Respondent was bringing up other matters and he decided that it would be futile to continue.

Pursuant to the Respondent's procedures, Thomas was given a first followup to his UPC on December 13, 1979, by Nunn. In this follow up Nunn found no fault with Thomas' work performance, but claimed that Thomas continued to attempt "to discredit supervision by making unsolicited statements on some of the general information sheets" employees were asked to read. That was a reference to a communication distributed to supervision by Little congratulating the employees on the "excellent" rating achieved by the Respondent in its occupational health programs. This communication had been placed where the employees could read it, and Thomas had marked at the bottom of the communication: "I was not a part of this because I got hurt on the job. Harry Thomas." Thomas admittedly had entered his comment on the communication because he had objected to the "hassle" that he had received from the Respondent concerning his workmen's compensation claim and the Respondent's claim that he had not been hurt on the job.[14]

Thomas received his second UPC followup review on January 10 from Nunn. Nunn again rated Thomas as satisfactory in job performance but again complained that he was deviating from the intent of his UPC writeup because he was continuing to display reluctance to sign documents put out for employees to read and sign.

On April 3 Thomas received his third UPC followup from Nunn and was again rated as satisfactory in job performance. Nunn related in the followup that Thomas had been more cooperative with his supervisors than in prior periods and that a positive trend should continue to maintain his satisfactory level. However, Nunn noted that Thomas had refused acceptance of safety awards which were given for safety programs, and those demonstrated some "negative attitudes" toward the Company's safety programs. Nunn's followup concluded that it was up to Thomas whether to accept safety awards, but the rejection of the awards did demonstrate a "negative attitude" on Thomas' part by not participating.

On April 19, only a few days after his third UPC followup, then Supervisor Ronny Black put Thomas on probation, the next step in the progressive disciplinary action leading to discharge. In the "probation contact" under the Respondent's procedures Black reviewed Thomas' conduct including those matters which had resulted in his receipt of the UPC as well as referring to additional matters and the events after April 16 which more immediately resulted in Thomas' being placed on probation. Such additional matters included an occurrence in April 1979[15] involving then supervisory trainee Black, who had approached Thomas with a list of items from a safety audit which required correcting. Thomas had refused to accept the list and referred Black to his supervisor, West. It was thereafter necessary for West personally to take the lists to Thomas to have him correct them. This incident was admitted by Thomas, but he claimed, however, that he had not been chastised about the incident at the time.

A second incident mentioned in the probation contact and not previously mentioned in the UPC occurred on June 28, 1979, while Thomas was on disability leave recuperating from his hernia operation. On that occasion Supervisor Platt telephoned Thomas regarding the rescheduling of Thomas' vacation as a result of a change of operation to a 12-hour shift. Black's probationary memo related (and was supported by the testimony of Platt herein) that Thomas had told Platt to do what he "damned" pleased with respect to the vacation scheduling. The probationary report concluded that the incident demonstrated Thomas' continued lack of cooperation with supervision. Thomas did not deny the incident in his testimony herein and admitted he had been short with Platt and had hung up on him. However, he did deny the use of profanity in talking with Platt.

Black continued, stating that on September 14 Thomas had completed five job cycle checks, but failed to sign the job cycle checklist in the space provided as required under established practices.[16] While Thomas did not deny that he did not sign the job cycle checks in question, he claimed in his testimony that he had not been criticized before for failing to sign job cycle checks.

With respect to the April 16 matter which directly resulted in the UPC, Black, on the probation contact and in his testimony, related that Thomas had been given two job cycle checks to be completed. On one of the lists Thomas had noted that he did not understand it, so Black explained it to him to the point that Thomas related he understood. Thereafter, Thomas filled out the form on the job cycle check (job A-20), but at the bottom of the checksheet Thomas wrote, "I had to fill out this form again because I had a comment on it." On the second job cycle check (A-16) Thomas had written at the bottom of the page that he did not perform the job and instead of signing it in the place required he initialed it at the bottom of the page. When Black asked if Thomas understood the standard practice, Thomas lied that he did but that he had not performed the job. Black then took Thomas out to the job, found a problem coinciding with that treated in the job cycle checklist and had Thomas do the job. Black then asked Thomas to complete the job cycle checklist. Thomas did so upon returning to the office, but at the bottom of the checklist wrote, "Bobby Black did not have on protective equipment while showing operator how to perform this job." There is no dispute that Black did not have on safety equipment at the time while Thomas did so.[17] However,

[14] The Respondent's interest in concluding that Thomas' injury in the summer of 1979 was not job related is consistent with its desire to preserve its perfect safety record reflected by the absence of any workmen's compensation claims prior to that of Thomas'.

[15] While the April 1979 incident was not referred to in the UPC, it was mentioned in the responses of certain supervisors to Thomas' grievance on the UPC. Moreover, Platt testified without contradiction that it was mentioned to Thomas at the time he received the UPC.

[16] A job cycle checklist was a procedure initiated by the Respondent to provide an auditable record indicating that an operator had been advised of certain required standard practices connected with a particular job or task and understood them.

[17] Black claimed in his testimony that he was not required to have on any safety equipment under the circumstances since he was far enough away from the work Thomas was doing. Safety rules required safety equipment (gloves and goggles) if an individual was within 15 feet of the

Continued

Black pointed out that he was not performing the job and only was instructing Thomas verbally from a distance on how to do it at the time. Black concluded that Thomas' performance in this regard further indicated a complete lack of respect for supervisory authority and a failure on Thomas' part to cooperate with supervision.

Following Thomas' being placed on probation, the Respondent conducted monthly interviews or followups with Thomas concerning his performance while on probationary status. The first three such followups point out no problems with Thomas' performance. The fourth followup on August 28 found Thomas' performance continued to be satisfactory and noted that he had completed all self job cycle checks completely and correctly and had reviewed and signed standard practices and safety rule changes. However, the followup, prepared by West, related an incident on August 3 undenied by Thomas, when Thomas came to Black's office and in the presence of West asked to see the job cycle checksheet that he had performed on April 16 on the bottom of which he had referred to Black's failure to wear safety equipment. Thomas, according to the testimony of West corroborated by that of Black, wanted to add to his comment on the job cycle list the comment that he was placed on probation because of this added comment. Black said that was not all of the story and refused to allow Thomas to make any added comments on the form. Black did, however, offer to show him the probation contact itself reflecting exactly why Thomas had been put on probation, but Thomas declined, stating that they would "all read it together" later.

On his fifth probation followup dated September 29 Thomas was rated satisfactory by West with no adverse comments.

Contentions and Conclusions

The General Counsel contends that Thomas' work performance had not attracted critical attention until after he became involved in union activities in 1978 and more particularly when he received his EPR in March 1979 reflecting that he needed improvement in certain areas shortly after a meeting in which he had expressed his union inclinations. The UPC which Thomas received on October 29, 1979, was, according to the General Counsel's argument, discriminatorily motivated and based on Thomas' union activities. Moreover, the General Counsel contends that both Thomas' workmen's compensation claim and his insistence upon adherence to safety practices were activities protected under the Act, citing *Walter S. Johnson Building Co., Inc.*, 209 NLRB 428 (1974), and *Krispy Kreme Doughnut Corp.*, 245 NLRB 1053 (1979), enforcement denied 635 F.2d 304 (4th Cir. 1980). Thomas' actions in these areas also provoked the October 29 UPC, the General Counsel contends, and thereby made it unlawful as well as the April probation contact since it was the direct result of the UPC. More particularly, with respect to the argument that the disciplinary action with respect to Thomas was based on his insistence upon safety practices, the General Counsel points to the undisputed testimony that Thomas had complained to then Superintendent Hale about a year or year and a half prior to the hearing about Supervisor Platt's performing a task without required safety gear on. In this regard Thomas testified that Hale subsequently reported to Thomas that he had discussed the matter with Platt and Platt had admitted that he had been in error and had related that it would not happen again. Hale had then, according to Thomas, requested Thomas to report safety violations whenever he observed them. Still with respect to the contention that Thomas' safety complaints were an element in his UPC, Thomas testified in September 1979 he had complained to Superintendent Sujka about Platt's direction to an employee to perform a task in a roped or barricaded "no entry" area. Thomas testified that he initially had been instructed to go behind the barricade but had refused, and the supervisor directed someone else to do so. While Superintendent Sujka acknowledged in his testimony that he had had a discussion with Thomas in September 1979 about barricading procedures and practices, he neither admitted nor denied Thomas' complaints about Platt at that meeting.

The Respondent in its brief denied that the UPC issued to Thomas and his subsequent placement on probation was in any way related to either his union activity, his filing of an unemployment compensation claim, or his complaints about safety violations. With respect to the contention that Thomas' disciplinary action was based on union considerations, the Respondent contended that Thomas' EPR in March 1979, which pointed out for the first time Thomas' inclination not to cooperate with supervision, Thomas had admittedly not begun his activity on behalf of the Union herein. Furthermore, in connection with the claim that the disciplinary action was based on Thomas' workmen's compensation claim, the Respondent points out that Thomas' claim was nontabulatable and not work related. Notwithstanding the workmen's compensation claim or award, the injury had not resulted in any disbarment from safety awards which would serve to provoke retaliatory action against Thomas. The Respondent points out the fact that Thomas' initial claim with respect to workmen's compensation was made more than 3 months after the initial uncomplimentary EPR and more than 3 to 4 months prior to the time of Thomas' UPC.

In answer to the argument that Thomas' disciplinary action was based on his safety complaints, the Respondent contends that Thomas' activity in this regard was not a protected activity since he was acting as an individual and that at no time did he actually inform the Respondent that he was representing the views of other employees. According to the Respondent's brief, various circuit courts of appeals have held such safety complaints not to be protected concerted activity under the Act, citing *Jim Causley Pontiac, Division Jim Causley, Inc.*, 620 F.2d 122 (6th Cir. 1980), remanding 232 NLRB 125 (1977); *N.L.R.B.* v. *Bighorn Beverage*, 614 F.2d 1238 (9th Cir. 1980); *Krispy Kreme Doughnut Corp., supra*. Finally, the Respondent contends that even if there were a mixture

work. While Black claimed he was more than 15 feet away, I am persuaded that Thomas believed Black was sufficiently close to require safety equipment.

of legitimate and unlawful reasons the record fully substantiates that the same action would have been taken against Thomas in the absence of his protected conduct. *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980).

The timing of the issuance of the EPR to Thomas on March 24, 1979, within 3 days after his involvement in the employee meeting with supervision wherein Thomas emphasized his union sympathies suggests rather clearly that the derogatory comments in the EPR in areas of Thomas' performance not previously criticized were based on union considerations. Moreover, since EPRs were not issued on a fixed and rigid schedule, issuance of an EPR on Thomas at that particular time renders further suspect the Respondent's *bona fides* in the EPR. While Thomas had received a prior EPR in 1978 from West noting that he needed improvement in certain areas, Thomas had not been chastised therein for not cooperating with supervisors as he was in the 1979 EPR. Moreover, West was vague in his testimony as to specific instances relied on to substantiate his claim as to Thomas' uncooperative nature prior to the 1979 EPR. West generalized and referred to the "problem" with Thomas as a failure of Thomas to communicate with Second-Line Supervisor Platt, but no specific instances of this failure to communicate were noted.[18] In view of this lack of specificity, I credit Thomas' testimony to the effect he had not been previously warned regarding his lack of cooperation. For the same reason I credit his testimony over that of West to the effect that West told Thomas that he was not really in agreement with the EPR but could do nothing about it since it was "up the hall." Under these circumstances, and considering the union animus demonstrated by the Respondent by the violations of Section 8(a)(1) previously found herein, a strong inference is raised that the derogatory comments in Thomas' 1979 EPR particularly with respect to his "negative" attitude and "lack of cooperation" with supervision were, at least in part, responsive to Thomas' announcement of his strong union sympathies 3 days earlier.

The inference that the unsatisfactory EPR resulted from union considerations, coupled with the Respondent's demonstrated union animus and Thomas' credited testimony regarding Monroe's statement that the Respondent considered Thomas a threat in part because of his union activities, constitutes a *prima facie* showing that the UPC issued Thomas on October 29, 1979, and the probation contact of April 16 which flowed from it were discriminatorily motivated. Such a showing serves to shift to the Respondent the burden of demonstrating that the same action would have taken place even in the absence of Thomas' union activities. *Wright Line, a Division of Wright Line, Inc., supra.*

I conclude that the Respondent has satisfied its burden in this regard. In so concluding I note that Thomas' union activities were well known to the Respondent for more than 6 months prior to the issuance of the UPC. In the meantime, Thomas in June 1979, when contacted by Platt regarding vacation schedules, had clearly demonstrated his disrespect for Platt by discourteously hanging up the telephone on Platt. Yet this act had not drawn any disciplinary action. Nor had there been any disciplinary action taken in April 1979 when Thomas defiantly refused a work assignment from the then supervisory trainee Black thereby necessitating West's direct involvement in the assignment. The failure to discipline Thomas for these incidents in spite of knowledge of his union activity further undermines a conclusion that an effort was made to find sufficient fault with his work to provide a basis for discriminatory discipline.

The September 30, 1979, incident at the truck shed which was relied on by the Respondent in the UPC requires close examination. The incident very clearly reveals Thomas' acquaintance with the safety rules, but it also demonstrates Thomas' argumentativeness and his willingness to challenge the authority and discretion of his superiors. While Thomas' willingness to question his supervisors on application of safety rules cannot be seriously faulted, his conduct in the truck shed indicated a desire to irritate, antagonize, and embarrass both Platt and Black. Although, as I have previously found, Thomas was correct in his position on the rules regarding the wearing of "hot suits" in the bay area anytime any hoses were connected to the trucks, he did not remind Platt and Black of this until *after* they had breached the rule. Moreover, after any potential danger had passed, either with respect to the connecting of a steam hose to the truck or to the presence of Platt or Black in the bay area without "hot suits," Thomas made a determined effort in the early morning hours to telephonically report the incident to the superintendent at his home. Such defiance of supervision in the absence of showing of any danger to himself or any other employee, I conclude, provided a legitimate cause for Thomas' discipline. Again, however, there was no rush to disciplinary action despite Thomas' union activity.

The incident with Dillon, Daniel's safety supervisor, likewise provided the Respondent with a clear opportunity to discipline Thomas for Thomas was without doubt at fault in the encounter as the General Counsel concedes. Yet it brought about only a mild oral rebuke from Supervisor Nunn, an unlikely response if the Respondent was indeed seeking a way to retaliate against Thomas for his union activities.

It was not until Thomas failed to sign the standard practice revisions on or about October 28, 1979, that the Respondent acted to give Thomas the UPC. With respect to his failure to sign those revisions, Thomas admitted that he had been specifically told by Nunn to read and sign the revisions. Thomas sought to excuse himself for failing to sign the revisions on the basis that he had a question about one of them. Although I have found Thomas generally credible, I cannot accept and do not credit his excuse for failing to sign the revisions, for there were three forms or sheets to be either signed or initialed.[19] If a question precluded his signing one of

[18] In justifying the EPR to Assistant Superintendent O. M. Ebra-Lima in a memo in April 1979 (Resp. Exh. 6), West did not refer to any communication problem. The only incident mentioned in the memo possibly relating to Thomas' lack of cooperation was one which occurred *after* the EPR was issued.

[19] Resp. Exhs. 12(a), (b), and (c).

them, it would not have excused his failure to sign the others. Accordingly, I find Thomas' failure to sign a single sheet signifying that he had read the revisions as directed was willful. Whatever the past practice had been with respect to signing, it is clear that in this instance Thomas had specific instructions to sign.[20] I find and conclude that his failure to sign the revisions, when coupled with the other grounds, provided a legitimate basis for the UPC and that Thomas would have received the UPC regardless of whether the Respondent considered him a threat because of his union activity. Accordingly, I find no violation of Section 8(a)(3) of the Act in Thomas' UPC. It follows that since the UPC was lawful, and because of the absence of independent evidence showing that he was put on probation on April 16 for his union activity, I find that Thomas was not put on probation for such activities.

Turning to the contention that Thomas' UPC and probation contact were predicated on his safety complaints, it must first be observed that applicable Board law holds that employee complaints regarding the safety of working conditions is a protected activity where the complaint is of moment to all employees. See, e.g., *Diagnostic Center Hospital Corp. of Texas*, 228 NLRB 1215 (1977); *Alleulia Cushion Co., Inc.*, 221 NLRB 999 (1975); *Walter S. Johnson Building Co., Inc., supra.*[21] But see *N.L.R.B.* v. *Bighorn Beverage, supra.*

As the Board said in *Diagnostic Center Hospital Corp., supra* at 1217, interpreting *Mushroom Transportation Company, Inc.* v. *N.L.R.B.*, 330 F.2d 683 (3d Cir. 1964):

> A correct reading of the case is that activity will be deemed concerted in nature if it relates to a matter of common concern and this common concern will be found with respect to violations of a safety statute which created a general hazard for employees.

On the other hand, where a single employee's action with respect to complaints to his employer regarding working conditions is shown to be based on the employee's own personal interest or for his own personal gratification or reward, it may not be protected. *Northeastern Dye Works, Inc.*, 203 NLRB 1222 (1973). Motive of the employee is thus critical to the determination of whether the employee's voicing of a working conditions complaint is concerted and protected. Thus, if an employee raises a complaint, even one regarding safety, in bad faith or in order to harass an employer rather than to improve working conditions, the employee risks loss of protection under the Act.

In the instant case it is undisputed that Thomas had raised a number of complaints regarding violations of the Respondent's safety rules by supervisors. Thus, Thomas had complained to Superintendent Hall sometime prior to August 1979 about Platt's performing a task without safety equipment on. The Respondent does not deny that Supervisor Platt breached safety rules on this occasion. But there was no showing that Platt thereby endangered any one other than himself. Moreover, while Thomas had observed the violation he had not called it to the attention of Platt before utilizing the Respondent's "open door" policy to complain to Hall.

Thomas also accused Platt and Black of a safety rule violation by entering the truck bay area without "hot suits" when a hose was connected to a truck. But Thomas even though present did not remind either supervisor of any "hot suit" requirement *prior* to the time they went into the bay area, and raised the point only after they came back into the truck shed. Here again no employees, including Thomas, were shown to have been endangered by the rule violation. This incident, it appears and I conclude, demonstrates that Thomas was more intent on "hassling" his supervisors rather than advancing safety concerns common to employees.

The incident of April 16 with Black further reflects Thomas' intent with respect to his safety complaints. While he considered Black's standing within 15 feet of him during Thomas' performance of the job cycle check to be a breach of safety rules, Thomas said nothing to Black until the task had been completed and the two had returned to Black's office where Thomas wrote out the alleged violation on the bottom of the job cycle check form. Clearly, Thomas in this incident sought to irritate and antagonize Black.[22] As in the other two situations discussed above, the April 16 incident did not involve danger to either Thomas or to any nonsupervisory employee.

Considering the foregoing, I conclude that Thomas in making those complaints regarding safety violations which were referred to in his UPC and his subsequent probation contact was not engaged in protected activity under the Act. Rather, I conclude on the credited evidence and my sense of the record that Thomas, notwithstanding his general safety awareness and familiarity with safety rules, was utilizing the rules and breaches thereof to harass his supervisors in retaliation for the harassment he felt he received as a result of his workmen's compensation claim. Accordingly, I conclude that the Respondent's reliance on Thomas' safety complaints as a factor in giving him a UPC or putting him on probation did not constitute a violation of the Act.[23]

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[20] All the other employees on Thomas' shift signed or initialed all three of the cover sheets. This included employee Phil Baham who testified at the hearing that he had failed to sign job cycle checklists previously without being disciplined therefor, but his testimony did not extend to the failure to sign standard practice and procedure revisions.

[21] See also *T & T Industries, Inc.*, 235 NLRB 517, 520 (1978), and *Erie Strayer Company*, 213 NLRB 344 (1974), where the safety complaints although voiced by an individual were protected because they related to provisions of an applicable collective-bargaining agreement.

[22] Thomas' reluctance to sign the job cycle sheet and his further effort to irritate Black on this occasion are shown by Thomas signing the job cycle check with a signature having no similarity to that of his normal signature. Comparison of Thomas' signature on his 1978 EPR (G.C. Exh. 3) and 1979 UPC (G.C. Exh. 5) reveals no similarity with that of the April 16 job cycle checks (Resp. Exhs. 14 and 15).

[23] Only one safety complaint of Thomas might fall within the realm of protected activity. That involved his complaint about Nunn's sending an employee into a barricaded area to take a product sample. Thomas took that matter up with Sujka sometime in August 1979. While the complaint clearly involved safety of employees, it is not entirely clear what the safety rule was or if there was a clear breach of the rule. In any event, there was no evidence that this particular safety complaint played any part in the UPC or probation contact. The hiatus between the August complaint and the late October UPC coupled with the intervening events which directly resulted in the UPC realistically preclude its assessment as a factor in the UPC. See *Erie Strayer Company, supra.*

Considering next the General Counsel's third contention that Thomas' UPC and the subsequent probation contact were based on his filing of a workmen's compensation claim, the Board held in 1979 that the filing of a workmen's compensation claim was a concerted activity protected under the Act. *Krispy Kreme Doughnut Corp., supra.* In so finding, the Board specifically overruled *Hunt Tool Company*, 192 NLRB 145 (1971), which had held to the contrary. In December 1980, the Fourth Circuit Court of Appeals denied enforcement of the Board's Order in *Krispy Kreme*, 635 F.2d 304. It is not necessary to discuss here either the rationale of the Board's Decision in *Krispy Kreme* or the court's decision in refusing to enforce the Board's Order. It is sufficient to note that the Board's Decision provides the applicable precedent which, with all due deference to, and respect for, the court's decision, is binding upon me. See *Insurance Agents' International Union, AFL-CIO (The Prudential Insurance Company of America)*, 119 NLRB 768, 773 (1957). Accordingly, based on the Board's *Krispy Kreme* Decision I find that Thomas' filing of a workmen's compensation claim was a protected concerted activity.

I am not persuaded, however, that the Respondent predicated the UPC or the probation contact upon Thomas' workmen's compensation claim. While the record is unclear as to when Thomas filed the claim, it is undisputed that the senior supervisor, Godfrey Little, discussed with Thomas his "involvement with workmen's compensation" on July 25, 1979.[24] Thus, I conclude that the Respondent was well aware of Thomas' claim for over 3 months prior to the time that he received the UPC. If the Respondent had been inclined to retaliate because of his workmen's compensation claim it allowed at least two opportunities to pass, the September 29 truck shed incident and the October 5 incident with Daniel Supervisor Dillon. Moreover, the UPC preceded the workmen's compensation hearing by more than a month and occurred at a time when there was a possibility that the hearing would be obviated by the insurance payment of all of Thomas' claims. While that possibility existed it would have been senseless to retaliate against Thomas for having filed the claim. I am not unmindful of Monroe's comment to Thomas that Thomas was considered by the Respondent to be a "threat" because of his workmen's compensation claim, but I conclude that had such a "threat" been a moving factor in the UPC the Respondent would more likely have acted substantially sooner. Considering the timing of the UPC, and in light of my conclusions that there was cause shown by the Respondent for the UPC and the later probation contact, I find and conclude that Thomas would have received the UPC and the probation contact even if he had not filed the workmen's compensation claim.

Considering the above and the record as a whole, I find and conclude that the Respondent did not violate Section 8(a)(3) and (1) of the Act in issuing the unsatisfactory performance contact for Thomas or subsequently putting him on probation.

[24] Little's notes on the discussion were entered in evidence as Resp. Exh. 21.

CONCLUSIONS OF LAW

1. Respondent E. I. DuPont de Nemours and Company, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union, United Steelworkers of America, AFL-CIO, CLC, is a labor organization within the meaning of Section 2(5) of the Act.

3. By interrogating employees regarding their union sentiments and activities and the union sentiments and activities of other employees; by creating the impression among its employees of surveillance of their union activities; and by threatening its employees with unspecified reprisals because of their union activities, the Respondent engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

5. The Respondent did not violate Section 8(a)(3) and (1) of the Act in issuing an unsatisfactory performance contact to Harry Thomas on October 29, 1979, or in putting him on probation on April 16, 1980.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, it will be recommended that the Respondent be ordered to cease and desist therefrom and that it take certain affirmative action designed to effectuate the policies of the Act, to include the usual posting of an appropriate notice to employees.

Upon the foregoing findings of facts, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[25]

The Respondent, E. I. DuPont de Nemours and Company, Inc., Wilmington, North Carolina, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Interrogating its employees regarding their sentiments and activities and the sentiments and activities of other employees in behalf of United Steelworkers of America, AFL-CIO, CLC, or any other labor organization.

(b) Creating the impression among its employees that their union activities are under surveillance.

(c) Threatening its employees with unspecified reprisals because of their activities on behalf of the above Union or any other labor organization.

(d) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights to self-organization; to form, join, or assist the above-named Union or any other labor organization; to bargain collectively through representatives of their

[25] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

own choosing; and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; or to refrain from any or all such activities.

2. Take the following affirmative action which will effectuate the purposes of the Act:

(a) Post at its plant in Wilmington, North Carolina, copies of the attached notice marked "Appendix."[26] Copies of said notice, on forms provided by the Regional Director for Region 11, after being duly signed by the Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(b) Notify, the Regional Director for Region 11, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

IT IS ALSO ORDERED that the consolidated complaint be dismissed insofar as it alleges violations of the Act not specifically found.

[26] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT interrogate our employees concerning their sentiments for, or activities in connection with, United Steelworkers of America, AFL-CIO, CLC, or any other labor organization; nor will we interrogate our employees regarding the union sentiments or activities of their fellow employees.

WE WILL NOT create among our employees the impression that their union activities are under surveillance.

WE WILL NOT threaten our employees with unspecified reprisals because of their union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights to self-organization; to form, join, or assist the above-named Union or any other labor organization; to bargain collectively through representatives of their own choosing; and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; or to refrain from any or all such activities.

E. I. DUPONT DE NEMOURS AND COMPANY, INC.